PREPARED STATEMENT OF COLETTE ROUTEL
ASSISTANT PROFESSOR, WILLIAM MITCHELL COLLEGE OF LAW

ON

***CARCIERI V. SALAZAR*: THE IMPACT ON LAND, JOBS, AND ECONOMIC DEVELOPMENT**

BEFORE THE U.S. SENATE COMMITTEE ON INDIAN AFFAIRS

THURSDAY, OCTOBER 13, 2011

Good afternoon Chairman Akaka and distinguished members of the Committee. Thank you for the invitation to appear before the Committee today.

Back in 2009, I testified in front of the House Committee on Natural Resources regarding the flaws in the Supreme Court's holding in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2000). As you know, that decision concluded that the benefits of the Indian Reorganization Act ("IRA"), 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq*.), only extended to Indian tribes that were "under federal jurisdiction" on June 18, 1934, the date of the statute's enactment. I will not repeat my criticisms of the Supreme Court's decision here. Rather, I will begin by explaining why the *Carcieri* is contrary to express policies emanating from this Committee and adopted by Congress over the past 20 years. Then, I will attempt to provide the Committee with examples of how this decision has affected Indian tribes across the country, including tribes who no one ever believed would be impacted by the decision.

I. Background: The *Carcieri* decision and its clash with Congressional policy

A. Congressional policies establish that equal footing for Indian tribes is necessary

The *Carcieri* decision is diametrically opposed to two longstanding Congressional policies. First, Congress has always intended for all Indian tribes to be entitled to the same federal rights and benefits. For example, in nearly every individual recognition statute passed since the 1970s, Congress provided that the newly recognized or re-recognized tribe was permitted to access all of the rights and benefits provided by the IRA.[1] Additionally, in 1994,

[1] *See, e.g.*, Tonto Apache Tribe of Arizona, P.L. 92-470 (Oct. 6, 1972) ("The Payson Community of Yavapai-Apache Indians shall be recognized as a tribe of Indians within the purview of the Act of June 18, 1934 . . . and shall be subject to all of the provisions thereof"); Pasqua Yaqui of Arizona, P.L. 95-375 (Sept. 18,1978) ("The provisions of the Act of June 18, 1934 . . . are extended to such members described in subsection (a) of this section"); Cedar City Band of Paiutes in Utah, P.L. 96-227 (Apr. 3, 1980) ("The provisions of the Act of June 18, 1934 . . . except as inconsistent with the specific provisions of this Act, are made applicable to the tribe and the members of the tribe. The tribe and the members of the tribe shall be eligible for all Federal services and benefits furnished to federally recognized tribes"); Mashantucket Pequot Indian Tribe of Connecticut, P.L. 98-134 (Oct. 18, 1983) ("all laws and regulations of the United States of general application to Indians or Indian nations, tribes or bands of Indians which are not inconsistent with any specific provision of this Act shall be applicable to the Tribe"); Ysleta Del Sur Pueblo of Texas, P.L. 100-89 (Aug. 18, 1987) ("The Act of June 18, 1934 (28 Stat. 984) as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to members of the tribe, the tribe, and the reservation"); Lac Vieux Desert Band of Lake Superior Chippewa, P.L. 100-420 (Sept. 8,

Congress enacted amendments to the IRA that explicitly prohibited any federal agency from promulgating a regulation or making a decision "that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes." 25 U.S.C. § 476(f) & (g). These amendments were passed in direct reaction to informal policies of the Bureau of Indian Affairs, which had begun classifying tribes into "created" and "historic" tribes, and limiting the benefits available to former.[2] Senator Inouye, who co-sponsored the legislation, told Congress that:

> The amendment which we are offering . . . will make it clear that the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes. . . . [I]t is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government. . . . Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. By enacting this amendment . . ., we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted.

140 Cong. Rec. S6147, 1994 WL 196882 (May 19, 1994).

Unfortunately, the *Carcieri* decision has shattered the stability Congress provided through the 1994 Amendments. It now requires the BIA to determine which tribes were "under federal jurisdiction" in 1934, and to extend the benefits of the IRA only to those tribes. Furthermore, the manner in which an Indian tribe became recognized is once again crucial. As noted above, tribes that were recognized by Congress are generally insulated from the impacts of *Carcieri* through express provisions in their recognition bills that make the IRA applicable to both the tribe and its members. Indian tribes recognized through the Office of Federal Acknowledgment ("OFA"), however, have no such insulation. Drawing a distinction between

---

1988) ("The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, Indian tribes, or Indian reservations which are not inconsistent with this Act shall apply to the members of the Band, and the reservation"); Yurok Tribe of California, P.L. 100-580 (Oct. 31, 1988) ("The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 et seq.), as amended, is hereby made applicable to the Yurok Tribe"); Pokagon Band of Potawatomi Indians of Michigan, P.L. 103-323 (Sept. 21, 1994) ("Except as otherwise provided in this Act, all Federal laws of general application to Indians and Indian tribes, including the Act of June 18, 1934 . . . shall apply with respect to the Band and its members"); Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians, P.L. 103-324 (Sept. 21, 1994) ("All laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians, including the Act of June 18, 1934 . . . which are not inconsistent with any specific provision of this Act shall be applicable to the Bands and their members").

[2] This was an odd distinction for the BIA to make, because Congress does not have the power to create an Indian tribe. *United States v. Sandoval*, 231 U.S. 28 (1913) (noting that Congress may not "bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe").

Congressionally-recognized and OFA-recognized tribes to the detriment of the latter group, is also contrary to the past policies of this Committee.

Over the past decade, Congress has encouraged Indian tribes to seek recognition through the process administered by the OFA. For example, in 2006, this Committee held a hearing on two recognition bills. *See* S. 437, The Grand River Ottawa Indians of Michigan Referral Act & S. 480, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, Hearing before the U.S. Senate Committee on Indian Affairs, 109th Cong. (2006). Senator McCain opened that hearing by stating that Congress should confer recognition upon Indian tribes only if there are "extenuating circumstances" present. *Id.* at 2. He noted that "Congress is ill equipped to conduct the rigorous review needed to provide the basis for such [recognition] decisions." *Id.* at 1-2. While he admitted that groups have had to wait enormous lengths of time to successfully navigate the OFA process and obtain recognition, Senator McCain believed that it would be "substantially unfair to provide a legislative path short-circuiting the process for some tribes while others labor for years to get through the regulations." *Id*. Similar statements abound in Congressional recognition hearings. Congress appears to have adopted this approach, because over the course of the past decade, it has not granted federal recognition to *any* Indian tribes. The last tribe recognized through Congressional legislation was the Loyal Shawnee Tribe of Oklahoma, P.L. 106-568 (Dec. 27, 2000).

The *Carcieri* decision makes it significantly more difficult for tribes recognized through the OFA process to obtain trust lands. Why should tribes stand in line and wade through the OFA's lengthy and costly process when at the end, they may be unable to obtain the most basic right – the ability to acquire a land base? Without a territory to govern, tribal sovereignty is severely restricted and economic development opportunities are non-existent. The Cowlitz Indian Tribe provides an excellent illustration of the problems created by the *Carcieri* decision for OFA recognized tribes.

B. The Cowlitz Example

The Cowlitz Indian Tribe is one of the few tribes that managed to obtain federal recognition through the onerous OFA process. The Tribe has a long relationship with the federal government. The Cowlitz Indian Tribe entered into treaty negotiations with the United States in 1855. But the United States sought to remove the Tribe to a distant portion of Washington State, and settle them on land already reserved for another Indian tribe. When the Tribe refused, the President simply extinguished aboriginal title to all of their lands via Executive Order.

The original language of Section 16 of the IRA only allowed Indian tribes with reservations to organize Constitutional governments. Because the Cowlitz no longer owned any land, they were not able to organize under the Act. Over time, the BIA came to regard the Cowlitz as an unrecognized tribe, even though the Tribe had a long history of interaction with all branches of the United States government.

The Tribe formally asked the BIA to restore its recognition in 1977. Twenty five years later, in 2002, the OFA issued a final determination granting the Cowlitz Indian Tribe federal recognition. Immediately after obtaining recognition, the Tribe petitioned the Secretary of the

Interior to take land-in-to-trust under Section 5 of the IRA, for the Tribe's reservation in Clark County, Washington. Years later, the BIA was finally ready to complete the fee-to-trust and reservation proclamation process when *Carcieri* was decided. The near-completed trust acquisition was now called into question.

The Tribe's attorneys quickly completed an 80-page manuscript documenting that the Tribe was under federal jurisdiction in 1934. Ultimately, the BIA agreed with the Tribe, and once again, was prepared to take the land into trust for the Tribe. But in January 2011, Clark County, certain gaming facilities, and individual landowners filed suit in the U.S. District Court for the District of Columbia against the Department of the Interior, challenging the trust acquisition. The complaint states that "the Cowlitz Tribe was neither federally recognized nor under federal jurisdiction in June 1934." *See Clark County v. Salazar*, No. 11-00278 (D.C. Cir. filed Jan. 31, 2011). If Congress fails to pass a *Carcieri* fix, litigation could delay the Tribe's trust acquisition for years.

These events have had a devastating impact on the Cowlitz Indian Tribe. The Tribe had to borrow a substantial sum of money to purchase fee title to the land that it seeks to be taken into trust as its initial reservation. Interest has been accruing on that loan for *10 years* already, and there is no end in sight. The Tribe cannot borrow any additional funds, because lenders will simply not accept the risk that *Carcieri* has created. Without a land base, the Tribe has few options for economic development to generate funds for governmental operations, and the federal government has denied the Tribe's requests for grant funding, because it has no reservation. Just last week, for example, the Tribe received notice that it was not awarded a grant to assist in the development of a Tribal Court system, because funding preferences were given to tribes with a reservation land base.

II. The Supreme Court's decision has resulted in costly delays for all Indian tribes

The *Carcieri* decision, however, does not simply affect tribes that were recognized through the OFA process. In 2009, Sandra Klineburger, Chairwoman of the Stillaguamish Tribe of Indians, told the House Committee on Natural Resources that "[n]o decision to take land into trust on behalf of a tribe [would be] safe from challenge," and that tribes would be forced to "expend limited governmental resources" to defend against frivolous challenges. Those statements have proven to be quite prophetic. Indian tribes across the country – including tribes that must have been under federal jurisdiction in 1934 – have faced challenges to trust acquisitions that would have been routine prior to the Supreme Court's decision. I will briefly highlight two unlikely examples.

Long before the *Carcieri* case was decided, the Fond du Lac Band of the Minnesota Chippewa tribe filed an application asking the federal government to take an 80-acre parcel of land known as the "Block Property" into trust. This land was within the exterior boundaries of the Fond du Lac Reservation, but had been lost due to the federal government's allotment policies. The Band indicated that it planned to use the land in a manner that was consistent with its Land Use Plan, which gave priority to the protection of cultural and historical sites, hunting and sugar bush land and riparian areas, as well as to the creation of new affordable housing. The

BIA-Minnesota Agency issued a final determination to take the parcel into trust on February 4, 2009.

Carcieri was decided not long thereafter. After reviewing the decision, Saint Louis County appealed the BIA's determination. In its statement of reasons, the County claimed that the BIA lacked the authority to take land into trust for the Fond du Lac Band. The County acknowledged that the Minnesota Chippewa Tribe, of which the Fond du Lac Band is a part, adopted an IRA-approved Constitution in 1936. But it claimed that this did not prove that the Band was under federal jurisdiction two years earlier, when the IRA was first enacted.

This argument was meritless. After all, the constituent bands of the Minnesota Chippewa Tribe voted to accept the IRA on October 27 and November 17, 1934. These were the first two dates that the government called elections under the Act. While the County eventually admitted that this was a frivolous claim and withdrew it, Fond du Lac's land was not taken into trust until August 2010.

Surprisingly, this is not an isolated instance. All over the country objections are being filed to trust acquisitions by Indian tribes who would seem to fit any possible definition of "under federal jurisdiction" in 1934. For example, the Rosebud Sioux Tribe is a "treaty tribe" and has seemingly maintained continuous federal recognition as an Indian tribe. The Tribe voted in favor of the IRA on October 27, 1934, just four months after the statute was enacted. Its IRA Constitution was approved by the Secretary of the Interior in November 1935, and a Section 17 Charter was issued to the Tribe on March 16, 1937.

Despite these seemingly incontrovertible facts, the State of South Dakota is currently challenging three of the Tribe's pending trust applications, claiming that the Rosebud Sioux Tribe was not "under federal jurisdiction" when the IRA was passed. These trust applications are for: (1) Bear Butte Lodge, a sacred site located in the Black Hills; (2) a nursing home that has already been operating for nearly 20 years and is located within the exterior boundaries of the Rosebud Reservation on land that was lost due to allotment; and (3) the Chamberlain Ranch, which is land currently owned by the Tribe and leased to a tribal member for agricultural use. Trust applications for these three locations have been pending with the Bureau of Indian Affairs for more than two years now.

Delaying these trust applications has cost the Tribe a substantial amount of money in attorneys' fees as well as state real estate and other taxes. Even more importantly, however, delaying the Tribe's trust application for Bear Butte Lodge risks the destruction of that sacred site. The surrounding area is being developed, and the property is not protected from state or

federal eminent domain power (which might, for example, be exercised to create rights-of-way for oil or natural gas pipelines) while it remains in fee status.[3]

III. The Impact on Jobs and Economic Development

Carcieri has also had a significant impact on jobs and economic development. First, tribes that remain landless after successfully navigating the OFA recognition process are prevented from taking advantage of numerous federal programs that are tied to a federally recognized Indian reservation.

The Mashpee Wampanoag Tribe obtained recognition through the OFA in 2007, nearly 30 years after filing its request for federal acknowledgment. *See* 44 Fed. Reg. 116 (Dec. 22, 1978) (Notice of Intent); 72 Fed. Reg. 8,007 (Feb. 22, 2007) (Final Determination). Today, due in large part to the Supreme Court's decision in *Carcieri*, the Mashpee Wampanoag Tribe still does not have a single acre of trust land.[4] Without a land base, Tribal members continue to struggle. Half of all Tribal members live below the poverty line, and the median household income of Tribal members is less than half the Massachusetts average. Only 48% of Tribal adults have a high school diploma, making job prospects in this economy bleak.

Mashpee members could really benefit from the many grant programs that the BIA and other federal agencies offer to enrolled members of federally recognized tribes. But nearly all of these programs are either explicitly or as matter of practice restricted to members who live "on or near reservations." *See, e.g.*, 25 U.S.C. § 1521 (Indian Business Development Program, whose purpose is to increase entrepreneurship and employment only provides grants to Indians and Indian-owned economic enterprises "on or near reservations"); 25 C.F.R. Part 20 (Financial Assistance and Social Services Programs including the Tribal Work Experience Program, Disaster Assistance, and Burial Assistance, are available only to Indians living "on or near reservations" or in service areas designated by the Secretary); 25 CFR Part 26 (Employment Assistance for Adult Indians provides support for adult Indians residing "on or near Indian reservations"); 25 CFR Part 27 (Vocational Training for Adult Indians provides services to Indians "on or near Indian reservations"); 7 C.F.R. §§ 253, 254 (Department of Agriculture's Food Distribution Program provides services to low-income Indians that reside "on or near all or any part of any Indian reservation").

---

[3] A federal statute enacted in 1948 provides the Secretary of the Interior with the authority to grant rights-of-way across Indian lands. *See* Act of Feb. 5, 1948, 62 Stat. 18. The Act exempts any Indian trust lands belonging to a tribe organized under the IRA, absent tribal consent. *See id.*, codified at 25 U.S.C. § 324 ("No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984) . . . shall be made without the consent of the proper tribal officials"). Importantly, Indian fee lands or lands acquired by a non-IRA tribe are not exempt from the provisions of this statute.

[4] For clarification, I do not mean to imply that the Mashpee Wampanoag Tribe – or any other Indian tribe referred to in my testimony – was not "under federal jurisdiction" in 1934. Determining the answer to this question will require (1) multiple court decisions and/or federal regulations defining that phrase; and (2) extensive factual investigation by each Indian tribe.

The Tribe has hopes of establishing a destination resort casino. A project like this would create thousands of permanent jobs as well as numerous temporary construction jobs for both Indians and non-Indians alike. Money obtained through gaming operations could then be used to fund the Tribal government and to provide services for needy members. The Tribe would like to acquire trust lands in Mashpee to protect its burial grounds and the site of the oldest meetinghouse in the country, as well as to create a Tribal community/government center and housing for Tribal members unable to afford the high housing costs on Cape Cod. But all of these plans are currently on hold because of *Carcieri*.

A lack of trust lands also prevents tribes from establishing smaller businesses. The Jamestown S'Klallam Tribe was recognized by OFA in 1981. The Tribe has 30 acres of trust land, only seven acres of which are designated as a reservation. Just following the issuance of the *Carcieri* decision, the Tribe filed an application requesting that the Secretary take a five-acre parcel of land into trust. The Tribe planned to create a store that would sell fireworks on the property. While this seasonal business was unlikely to generate significant revenues, it would provide jobs for younger tribal members over the summer months.

The Tribe submitted detailed documentation establishing that the Jamestown S'Klallam Tribe was under federal jurisdiction in 1934, which included reference to the on-going treaty relationship that the Tribe has with the federal government. *See Carcieri*, 129 S.Ct. at 1069-70 (Breyer concurring) (noting that a tribe could be under federal jurisdiction even if the federal government did not believe so at the time if it had an on-going treaty relationship). Neither the County in which the land was situated, nor any other person or governmental entity objected to the trust acquisition. Prior to *Carcieri*, the Tribe's application would have been processed by the BIA Regional Office in approximately 8 months. But instead, the Regional Solicitor had to wait for direction from the BIA, which was not immediately forthcoming. Only in August 2011 was this small parcel of land finally taken into trust. Over the past 2 years and 8 months, the Tribe missed three summers where it could have employed Tribal members and raised revenues through the fireworks business. Instead, the Tribe was forced to pay real estate taxes throughout this time period and incur attorney's fees while the land remained fallow.

Jamestown is a fortunate tribe. They were able to establish that they were under federal jurisdiction in 1934, and their trust acquisition was not tied up in agency appeals or federal court litigation. As the litigation update prepared for this Committee by the Native American Rights Fund demonstrates, many other Indian tribes will be addressing *Carcieri* issues for years to come unless Congress passes a "fix." I encourage you to do so.

Disclaimer: The comments expressed herein are solely those of the author as an individual member of the academic community; the author does not represent William Mitchell College of Law for purposes of this testimony.

Colette Routel
Assistant Professor, William Mitchell College of Law
Email: colette.routel@wmitchell.edu
Phone: (651) 290-6327